BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL,	)	
Petitioner,	)	
v.	)	B.B.O. File Nos. C5-15-0024 C5-17-0006
RICHARD J. REILLY, JR., ESQ.	)	
Respondent.	)	

HEARING REPORT

On August 31, 2017, bar counsel filed a petition for discipline against the respondent, Richard J. Reilly, Jr., Esquire.

The petition charged, in essence, that the respondent's representation of two groups of clients constituted a conflict of interest; that he settled one group's lawsuit to the disadvantage of the second group and without its consent; that he made misrepresentations to his clients; and that he failed to return their expense money, claiming it was owed him for fees. The respondent filed his pro se answer on October 19, 2017. On January 17, 2018, he moved to dismiss or defer claiming, in support of dismissal, that the petition was not sufficient to apprise him of the alleged misconduct and, in support of deferral, that civil litigation was likely. Bar counsel opposed the motion, and the Board Chair denied it on January 19, 2018.

The hearing was held on January 29 and March 5, 2018. Thirty-seven exhibits were admitted.[1] The respondent and three additional witnesses testified: Frances Bolton, a client; Richard Lombardi, a client; and Donna Waite, bar counsel's investigator. On

[1] Ex. 36, proffered by the respondent, is an unsigned, undated and incomplete c. 93A letter that was admitted conditionally: the respondent was ordered to submit, by March 7, 2018, a signed copy, the green card with the tracking number, the receipt from the post office, and the Ex. A referenced in the body of the letter. Tr. 2:58, 2:144. The respondent submitted none of these things. Accordingly, we will not consider Ex. 36 in our resolution of this case.

May 21, 2018, bar counsel filed her proposed findings and conclusions. The respondent did not submit proposed findings and conclusions.

Findings and Conclusions[2]

Findings of Fact

1. The respondent, Richard J. Reilly, Jr. was admitted to the Massachusetts bar on December 15, 1999.

The Breakers Resort and the Bolton and Lombardi Representations

2. In 2006, Frances Bolton and her husband purchased a timeshare unit in the Breakers Cape Cod Ocean Resorts development (the Breakers) in Dennisport, Massachusetts. Tr. 2:4-5 (Bolton); Ex. 28 (127). Including a credit for a trade-in for another unit they owned in a previous timeshare, they paid about $26,900 for the unit and financed $9,395. Tr. 2:5, 2:75 (Bolton); see Ex. 5 (040).

3. There were problems with the unit and the resort from the beginning. As of 2006, the Breakers was only partially completed and the Master Deed for the Breakers had not been recorded. Petition for Discipline, ¶ 5 (not denied).

4. The Boltons' initial use of their unit was delayed. Tr. 2:5 (Bolton). There is no dispute before us that there was not a hot tub, a dishwasher, or a full kitchen; although the promotional brochure had promised a kitchen, the developer was not able to get permits from the fire department. Tr. 1:22 (Respondent); Tr. 2:6 (Bolton).

5. In July 2006, Richard Lombardi and his wife purchased a timeshare unit at the Breakers. Tr. 2:85 (Lombardi). They paid $8,395. Id.; see Ex. 5 (050).

6. Lombardi testified that a promised jacuzzi was never installed, and that they were promised, but never given, a full cooking stove and oven. Tr. 2:87-88 (Lombardi). They have never used their unit; for the first four years, it was not ready for use, and since that time, they have been, in his words, "in a case" against the Breakers. Tr. 2:85 (Lombardi).

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[2] The transcript shall be referred to as "Tr. __: __"; the matters admitted in the answer shall be referred to as "Ans. ¶_"; and the hearing exhibits shall be referred to as "Ex. _." We have considered all of the evidence, but we have not attempted to identify all evidence supporting our findings where the evidence is cumulative. We credit the testimony cited in support of our findings to the extent of the findings, and we do not credit contradictory testimony. In some instances, we have specifically indicated testimony that we do not credit.

7. In approximately 2009, Lombardi, Bolton and other dissatisfied unit owners attended a meeting with Christopher Moss, the original sales agent at the Breakers. Tr. 2:6-7 (Bolton); 88-89 (Lombardi). A large group of owners attended this meeting. Tr. 2:7 (Bolton); 2:89 (Lombardi). Moss, in turn, put unit owners, including Bolton, in touch with the respondent. Tr. 2:7-8 (Bolton); 2:88-90 (Lombardi).

8. Before retaining the respondent, Bolton exchanged emails with him. Ex. 32. In his May 20, 2009 email, the respondent wrote, in pertinent part: "As far as the class action suit you mentioned, I would only go that route if all of the Breakers owners retained my services, which is highly unlikely." He indicated that he currently had twelve clients but that even if he ended up with over a hundred, "my strategy will not change." He planned "to move quickly on this case and file the complaint in June (no later than July) . . . ." Ex. 32.

9. In response to Bolton's question about his fees, he wrote: "My fee is a [$]1,000 retainer amount, and 20% of whatever funds I collect on your behalf (which includes the [$]1,000 initial payment)." Ex. 32. He continued: "If it goes to a full jury trial, which in my opinion will not happen as I can get a judgment before jury selection, then the fee is 30%, and 40% if the defendants appeal . . . which again is unlikely." He added that he "will be seeking payment of those fees from the developers, which is allowed by statute, so you may end up with a 100% refund." Id.

10. The respondent mailed Bolton a copy of his Compensation Agreement, the terms of which are discussed below. She signed it on May 21, 2009. Ex. 1 (002); Tr. 2:9-10 (Bolton). He never discussed an hourly fee with her, and she never was told what his hourly rate was. Tr. 2:11, 78 (Bolton).

11. The respondent also mailed Lombardi a copy of his Compensation Agreement. Ex. 2; Tr. 2:89-90 (Lombardi). He did not discuss the agreement with Lombardi, who read it, signed it on July 21, 2009 and mailed it back. Ex. 2 (004); Tr. 2:90-91 (Lombardi). There was no discussion of an hourly fee, and Lombardi was not aware of what the respondent's hourly fee was. Tr. 2:94 (Lombardi). It was Lombardi's belief that the terms expressed in the compensation agreement would govern the respondent's fees. Tr. 2:137 (Lombardi).

12. Pursuant to the fee agreements, Bolton and Lombardi each paid the respondent $1,000 as an advance payment toward litigation-related expenses. Ans. ¶ 8. Tr. 2:82 (Bolton); Tr. 2:110 (Lombardi).

13. The agreements signed by Bolton and Lombardi are virtually identical. They provided that the respondent was entitled to a fee of twenty percent of any recovery in money or property effected by settlement; thirty percent of the recovery "if made at any point between the beginning of the selection of the jury and the final decision of the jury"; and forty percent "thereafter, including Appeal if appeal is taken thereto." Ex. 1(001); Ex. 2 (003).

14. Each agreement also provided for the payment of $1,000 "for expenses as needed, to secure records and documents, to pay the costs of title examinations and reports, fees for expert witnesses, and the costs of service of notice of suit and filing of Petition." Id. We find that the fee agreement limited the purposes for which the expense money could be spent to certain enumerated categories. Each agreement further stated: "Any expense fund balance shall apply on law firm's fees; however, such balances so applied, unless hereinafter otherwise set forth, shall be considered in determining the percentages hereinafter referred to." Id.

15. Finally, the parties agreed that "except as may be heretofore set forth or as provided by law for the administration of assets other than this lawsuit, said attorneys shall receive no further compensation for services rendered under this Agreement if there is no recovery of money and/or property." Ex. 1 (002); Ex. 2 (004). This, together with the stated percentages of fees based on when the matter concluded (20% if settled before jury selection; 30% if settled after jury selection and before an appeal; 40% if an appeal is taken), means that these are contingent fee agreements within the meaning of Mass. R. Prof. C. 1.5.

16. We do not credit the respondent's testimony that he explained to his clients what he now claims his fee agreement provided – i.e., that he was being paid $1,000 to represent them and was entitled to the $1,000 as a flat fee even if he incurred less than that in expenses and reached no settlement. See Tr. 2-150-152 (Respondent). While we recognize that he used the word "retainer" in his letter to Bolton, see supra, ¶ 9,

we find that the letter was ambiguous in that regard and that in any event, it was superseded by the fee agreement which Bolton signed. Ex. 1 (002).

The Breakers Class Action Lawsuit

17. The respondent filed a Class Action Complaint in the Barnstable Superior Court on July 21, 2011 against The Breakers Resort, LLC. Ex. 5. His Ex. A to the complaint listed one hundred thirty-eight class members, many of them couples. Ex. 5 (038-062). Frances Bolton and her husband and Richard Lombardi and his wife were all listed. Ex. 5 (040, 050).

18. The respondent received at least $130,000 from the one hundred and thirty-eight Breakers clients on more or less the same terms as those set out in the Bolton and Lombardi agreements. Tr. 2:186 (Respondent); see Tr. 1:72 (Respondent); Ans. ¶ 11 (not properly denied).[3] The respondent had to pay a single filing fee of $275 for the class action complaint, plus sheriff's fees and fees "from chasing down the permits." Tr. 1:121 (Respondent). He agreed that his expenses in the entire Breakers matter were probably under a thousand dollars. Id.

19. The complaint alleged eight causes of action against Breakers, and sought relief including rescission of the plaintiffs' purchase and sale and financing agreements; judgment in favor of the plaintiffs "in an amount to be determined at trial"; costs, expenses and attorney's fees; and treble damages. Ex. 5 (035).

20. The respondent filed a motion to certify the suit as a class action suit. Ex. 4 (0015, #2); Ex. 6. This motion was allowed without opposition on June 21, 2012. Ex. 4 (0015); Ex. 6 (0063).

21. The Breakers' attorney did not answer the complaint, and a default against the Breakers was entered on September 21, 2012. Ex. 4 (015, #7). The court directed the

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[3] The respondent did not properly deny the allegation in ¶ 11 of the petition for discipline that "[b]y July 2011, approximately 140 other timeshare unit owners of the Breakers had hired [him] to file suit against the developer on their behalf . . . *on the same or substantially the same terms as described above with respect to Bolton and Lombardi, including the requirement of a $1,000 per client advance for expenses*." (Emphasis added). See Ans. ¶ 11 (denying generally and giving an irrelevant explanation that does not address the claim). BBO Rules, § 3.15(d) provides that "[t]he answer . . . shall state fully and completely the nature of the defense. The answer shall admit or deny specifically, and in reasonable detail, each material allegation of the petition and state clearly and concisely the facts and matters of law relied upon. Averments in the petition are admitted when not denied in the answer in accordance with this section." We conclude that the respondent's failure properly to deny this allegation constitutes an admission. We find that the terms of those other agreements were the same or substantially similar.

respondent to file, by October 22, 2012, a motion for the assessment of damages and default judgment or a request for default judgment. Ex. 8. The respondent filed nothing. On October 25, 2012, the Court entered a judgment of dismissal for failure to comply with its September 21 order. Ex. 10.

22. On November 20, 2012, the respondent moved to vacate the judgment of dismissal. Ex. 4 (015, #9); Tr. 1:76, 78 (Respondent). This motion was allowed, and the judgment of dismissal was vacated. Ex. 4 (015, #10). On December 11, 2012, the respondent was ordered to comply, on or before January 14, 2013, with the earlier-issued September 21, 2012 order. Id. He inexplicably did not do so, and a second judgment of dismissal entered January 18, 2013. Tr. 1:80 (Respondent); Ex. 4 (015, # 11).

23. Nothing on the docket reflects that a stipulation of dismissal was ever filed or that the dismissal was based on the parties' agreement. We reject the respondent's claim to this effect. See Tr. 1:67-69 (Respondent); Ex. 28 (175-176).

24. Contrary to the provisions of Mass. R. Civ. P. 23(c), to the effect that "[a] class action shall not be dismissed or compromised without the approval of the court," the respondent did not seek court approval. We find that he knew he needed court approval to settle the class action law suit. Tr. 2:156 (Respondent).

The Soundings Lawsuit

25. The respondent also represented time share owners in The Soundings Resort, a development located in Dennisport "right next door" to the Breakers. Ex. 28 (127). The Soundings was built by the same developer, financed and managed by the same companies, and represented by the same lawyer. Ans. ¶ 16; Ex. 3 (009); Ex. 4 (014); Ex. 9 (076). The resorts had the same principal owners. Tr. 1:58-59 (Respondent). The respondent filed a lawsuit against Soundings and Resort Fundings, LLC, on November 24, 2009. Ex. 3 (009-010).

26. The respondent received $1,000 from each of the thirty-three Soundings plaintiffs he represented, who executed contingent fee agreements with the same terms as the Breakers clients. Tr. 1:110 (Respondent); Ex. 28 (128, 130).

27. An order of default was entered against Soundings July 18, 2011. Ex. 3 (011, # 17). After a Second Amended Complaint was allowed on August 22, 2011, a nisi dismissal was entered June 28, 2012, with the parties ordered to file an agreement or

stipulation by July 30, 2012. Ex. 3 (012, #18, 21). This was later revised, and the parties were allowed to continue the nisi dismissal until November 27, 2012. Ex. 3 (012, # 23).

28. On November 27, 2012, the Court allowed the plaintiffs' motion to restore the Soundings case to the active trial list. Ex. 3 (012, #25). The plaintiffs were ordered to file, within thirty days, their motion for assessment of damages pursuant to the July 18, 2011 default order. Ex. 3 (012). Before the thirty-day period expired, on December 24, 2012, the parties filed a stipulation of dismissal as to all claims, with prejudice and with rights of appeal waived. Ex. 3 (012, # 26). We find that the case was dismissed because of a settlement documented on or about November 29, 2012, described below.

The Soundings Settlement

29. We have not been provided with a copy of the Settlement Agreement for the Soundings case. An undated document entitled "Addendum to Settlement Agreement by and between Plaintiffs Bastarache et al and Soundings Seaside Resort, LLC" ("Addendum"), however, references a Settlement Agreement dated November 29, 2012. Ex. 11.

30. The Addendum's three "whereas" clauses state that the seven named Soundings plaintiffs have not yet received compensation in accordance with the Settlement Agreement; that the defendant's lender, Resort Funding, has agreed to loan the defendant settlement funds "but solely upon the terms and conditions set forth herewith"; and that Resort Funding, "as an express condition of lending the Settlement funds to Defendant is also desirous of obtaining certain promises and assurances that the companion case [against Breakers, a Soundings affiliate] will be settled *without incurring any additional financial obligations on the part of said Defendant.*" Id. (Emphasis added). The respondent represents himself as the "duly-authorized attorney on behalf of his clients with respect to both the Soundings resort and the Breakers resort." Id.

31. The Addendum next provides for the Breakers case to be "dismissed without prejudice, and Plaintiffs' counsel agrees to not re-file said action and not to thereafter represent any clients (present or future) with respect to either the Soundings resort or the Breakers resort, if The Breakers LLC agrees to settle upon the following terms. . . ." Id.

32. The settlement terms are reiterated in subparagraphs (a) through (d). Subparagraph (a) provides that those plaintiffs who no longer wish to own their intervals at the Breakers may execute a deed "for nominal consideration" to the Breakers LLC or its nominee, for no monetary consideration but for relief from any "past, present and future financial obligations." Ex. 11 (078)

33. Subparagraph (b) references the cooktop stove issue and provides:

> Plaintiffs' counsel will inform those Plaintiffs in the Breakers case who were promised cooktops at the time of their respective purchases that the cooktop issue has been resolved and shall provide said Plaintiffs with the specifications and documentation provided by the Defendant for same. Any such Plaintiffs who wish to retain their intervals at the Breakers shall accept such cooktops and release Defendant Breakers LLC from any further claims.

Id.

34. Subparagraph (c) obligates the respondent to provide the Breakers with a list and contact information for those plaintiffs not dismissed under paragraphs (a) or (b). It then provides at Ex. 11 (079):

> It is Plaintiffs counsel's understanding that said Defendant will then arrange for Bluegreen Corporation[4] . . . to contact each such Plaintiff to discuss converting ownership at the Breakers to Bluegreen membership, and to offer such conversion. Plaintiffs' counsel shall contact the Plaintiffs referenced in this sub-paragraph . . . prior to delivering said list and shall inform the same that they will be contacted by Bluegreen.

35. Subparagraph (d) provides that as to any plaintiffs who choose not to settle "upon any of the alternatives set forth above, the undersigned Plaintiffs' counsel agrees to no longer represent them, or any other parties, with respect to either the Soundings or the Breakers." Id.

36. There follows a list of the seven people identified above who "have not received compensation in accordance with the [Soundings] Settlement Agreement." Ex. 11 (079). The amount owed them totals $161,675. Id.

37. The Addendum is signed twice by the respondent – individually, and also on behalf of seven named Soundings plaintiffs. Ex. 9 (0079). We find that the respondent signed in his individual capacity because he was making a personal

[4] The managing company for the two resorts. Ex. 9; Tr. 2:190 (Respondent).

commitment not to represent, in the future, any Breakers clients who did not agree to settle for one of the enumerated options. There are no signature lines for any other party, and no other signatures. Id.

38. The addendum's terms did not further the interests of the respondent's Breakers clients. The defendant in the Breakers case was facing an imminent default in a lawsuit seeking damages. To settle the Soundings case on terms favorable to himself and those Soundings clients, the respondent agreed to dismiss the Breakers lawsuit "without incurring any additional financial obligations on the part of said Defendant." In lieu of pursuing damages claims, the Breakers clients were given limited, unappealing options: walk away, forfeiting whatever money they had spent to purchase their intervals and only gaining relief from accrued and future financial obligations; or accept the intervals in their current state and release the defendant from further claims.

39. Before settling the Soundings case and agreeing to dismiss the Breakers case, the respondent did not seek consent from Bolton or Lombardi or inform them that a settlement had been reached in the Breakers litigation. We do not credit his statement that he showed Bolton the Addendum to the Soundings settlement agreement (Ex. 11). Tr. 2:175 (Respondent). We credit instead that Bolton did not see Ex. 11 until after she filed her complaint with OBC, years after it was signed, and we credit that the respondent never talked to her about the dismissal of the Breakers action. Tr. 2:71, 81-82 (Bolton). Lombardi did not see Ex. 11 until the disciplinary hearing. Tr. 2:105-106 (Lombardi).

40. Before settling the Soundings lawsuit and signing Ex. 11, the respondent did not tell the other Breakers plaintiffs that he was agreeing to no longer represent them. Tr. 2:202 (Respondent).[5]

41. The respondent's willingness to settle the matters together sprang, we find, from his eagerness to collect his twenty-percent of the $161,675 compensation paid to the

[5] We do not credit that the respondent sent an explanatory email about the Soundings settlement to his Breakers clients. Ex. 9 purports to be such an email; it is dated October 9, 2012 and indicates that it was sent from the respondent's breakerslawsuit@gmail.com email address. However, there are no recipients listed in the "to" line, and it was not sent to Bolton or Lombardi. Ex. 9; Tr. 2:24-25 (Bolton); 2:104 (Lombardi). The email contains some discussion of a prospective Breakers settlement, referenced the Soundings lawsuit, and discussed three options for settlement. We consider this email, authored by the respondent, an admission by the respondent, reflecting his state of mind and showing that as of October 9, 2012, he intended to settle the Soundings case at the expense of his Breakers clients.

Soundings plaintiffs. We find that this prospect corrupted his judgment and motivated the settlement of the Soundings case and concomitant dismissal of the Breakers case.

The Respondent's Fees

42. Once the Soundings case settled, the respondent received twenty percent of the settlement amount (Tr. 1:98, 101) (Respondent)) a number he estimated as around $20,000 (Ex. 28 (218-219)), but which actually worked out to $32,335. As indicated above, to effectuate the Soundings settlement, the respondent agreed that the Breakers case would be dismissed and accomplished this by failing to comply with the Court's December 12, 2012 order.

43. After the Breakers case was dismissed, the respondent did not refund any part of the $1,000 expense payments he had received from his class action clients, but instead kept the money as his fees. Tr. 1:121-122 (Respondent); Ans. ¶ 39 (claiming he is "entitled to compensation for such representation"). He did not return any money to Bolton or Lombardi. Tr. 2:43 (Bolton); Tr. 2:111 (Lombardi).

44. The respondent admitted that his retention of his clients' expense deposits was not compensation for a contingent fee. Asked directly how much he had received in contingent fees in the Breakers case, the respondent said, "Nothing. Nobody got a monetary settlement at all." Tr. 2:186 (Respondent); see Ex. 28 (210) ("nobody's gotten any money back").

45. We do not credit the respondent's testimony that he considered himself entitled to bill for hourly services against the $1,000 advance. See Tr. 2:184-185 (Respondent). While this credibility decision stands on its own we note, as articulated more fully in our conclusions, that the fee agreement did not provide for hourly fees. Further, the respondent's admitted failure to track his time, bill his clients and notify them when he was withdrawing earned fees undermines this claim. See Tr. 2:184-185 (Respondent). We do not credit that he moved funds from his IOLTA account into the operating account as he did work on the case. Tr. 2:185 (Respondent). Rather, we find a complete lack of audit trail regularities and we infer from his surreptitious, record-free transfer of the funds an awareness that he was not entitled to them.

46. We find further that the respondent actively harmed his clients by intentionally dismissing the lawsuit without their consent or knowledge and by agreeing

not to represent them in any new action. Considering all of the circumstances, the respondent was not entitled to any fee. See Liss v. Studeny, 450 Mass. 473 (2008) (no recovery on contingent fee contract or in quantum meruit where the contingency did not occur). We find and elaborate below that the respondent's use of the expense advances to pay himself legal fees that were not earned or authorized by the terms of his fee agreement constitutes the intentional misuse of client funds, and that the clients were and remain deprived of those funds. See Tr. 2:185 (Respondent).

47. The respondent testified that he continued to represent Breakers plaintiffs despite his agreement not to do so. For instance, he testified that eighty percent of the Breakers plaintiffs settled subsequent to the November 29, 2012 settlement and that "[w]e settled over a hundred of them." Tr. 2:171-172, 204 (Respondent). Continuing to represent these clients appears to us to be flatly prohibited by the respondent's agreement in the Addendum. See Ex. 11 (78, 79). More pertinent, the fact that he may have continued to represent clients after the Breakers lawsuit was dismissed and after his pledge not to do so does not lessen or ameliorate the conflict of interest or other rule violations we find below.

The Respondent's Communication with Clients

48. At the beginning of the respondent's representation, Bolton was not concerned by the lack of communication with him, since he had told her that it was going to take a few years to "get everything going." Tr. 2:18 (Bolton). We credit that by the time she sent him an email dated February 17, 2012, stating that she had not heard from him in years, it had indeed been years since she had had any contact. Tr. 2:65 (Bolton); Ex. 7. We credit that after he filed the Breakers suit, the only communication Bolton had with the respondent was when she "chased" him. Tr. 2:19 (Bolton).

49. We credit Lombardi's testimony that over the years he received "several" emails from the respondent in response to his inquiries about the case's status. Tr. 2:105 (Lombardi). He also received some but not all of the emails the respondent claimed he sent to the entire group of Breakers plaintiffs. Tr. 2:115-116 (Lombardi).

50. The respondent never said that the Breakers was not worth suing, or that suit against it would be futile. Tr. 2:22 (Bolton); Tr. 2:121 (Lombardi). We credit the

testimony of Bolton and Lombardi, and do not credit the respondent's testimony to the contrary. See Tr. 1:119-120, 2:202 (Respondent).

51. We do not credit the respondent's testimony that he told his clients he had no intention of actually trying the case against the Breakers. Tr. 1:69-70 (Respondent). This is wholly inconsistent with his fee agreement which, as indicated above, is studded with trial references, among them witness, service and filing fees, jury selection and appeal. Exs. 1, 2.

52. We find that the respondent did not send Bolton a copy of the Breakers class action complaint until April 16, 2014, after she asked him repeatedly about the status and after the respondent had allowed the complaint to be dismissed. Ex. 12; Tr. 2:17-18 (Bolton).

53. The respondent never sent Lombardi a copy of the complaint he filed. While he did send a copy of a complaint in November 2010, when Lombardi and his wife went to the clerk's office to ask some questions about it, they learned that the document they had been sent had never been filed. Tr. 2:99, 101-102 (Lombardi).

54. The respondent never informed Bolton or Lombardi that their cases had been dismissed. Bolton did not become aware of this until years later, when she visited the resort in April 2014 and was told by the manager that the case had been dismissed. Tr. 2:20 (Bolton).

55. On May 16, 2014, Bolton sent an email to the respondent requesting an explanation for the dismissal. Ex. 19 (091-092). He responded that day, advising Bolton that "[i]t was dismissed, but without prejudice, which means I can reinstate. Still working on the paperwork to re-file (next week should have it ready...)." Ex. 19 (091). We find that this statement was knowingly false: the respondent had specifically pledged *not* to refile and not to represent former clients, and we find he had no intention of drafting a complaint in May 2014.

56. Lombardi did not learn that there was nothing pending until he went to the Superior Court in January 2017. See Tr. 2:104 (Lombardi). Prior to that, in response to his November 18, 2016 email asking about the status, without disclosing that the earlier lawsuit had been dismissed nearly four years earlier the respondent wrote of "filing a

lawsuit in federal court in Boston." Ex. 26 (104). We find that the respondent's email was deceptive.

57. The respondent never discussed, by telephone, email or otherwise, the subject of a conflict of interest. Tr. 2-31 (Bolton). He never talked to Bolton about the dismissal of the Breakers suit as part of the Soundings settlement, or about his agreement not to represent any clients with regard to Breakers. Tr. 2:71 (Bolton).

58. The respondent never discussed a conflict of interest with Lombardi, who testified that he had not seen that reference until he saw the petition for discipline. Tr. 2:106-107 (Lombardi).

59. On April 4, 2015, Bolton sent the respondent a letter requesting a copy of her file. Ex. 21. Receiving no response, she contacted the respondent three more times and finally heard back from him by email on April 28, 2015. Tr. 2:42-43 (Bolton); Ex. 23 (100, 101); Ans. ¶ 30 (does not deny). In that communication, the respondent claimed he had already provided Bolton "everything" in previous emails. Ex. 23 (100). The respondent also asked Bolton if she wanted "to be removed from the lawsuit as well?" Id. This response was misleading, as there was no lawsuit pending. In response, Bolton affirmed that she did not want to be removed from the lawsuit. Id. She also requested an update on the status of the matter. Id. The respondent did not reply. Tr. 2:43 (Bolton).

60. The respondent claimed before us that there is still a viable cause of action available to him against Bluegreen, the managing company, for "interference with group contractual relations." Tr. 1:156-157 (Respondent). To the extent we understand this claim, it is immaterial. Bluegreen was not a defendant in either lawsuit and was not a party to the Addendum. Exs. 3, 5, 11. The respondent's attempt to deflect blame to Bluegreen does not obscure the basic fact that he abandoned a lawsuit about to be reduced to judgment, putting his own recovery ahead of his clients.'

61. We find that it is more likely than not that the limitations periods have all expired, and the claims of the Breakers' client are now time-barred.[6] The respondent has offered nothing to demonstrate otherwise.

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[6] The respondent's complaint includes tort claims, contract claims and statutory claims. Ex. 5 (028-034). The class members purchased their units between 2005 and 2008, Bolton on December 9, 2006 and Lombardi on July 18, 2006. Ex. 5 (040, 050). The tort claims have a three-year statute of limitations. M.G.L. c. 260, § 2A. The contract claims have a six-year statute of limitation. M.G.L. c. 260, § 2. M.G,L

62. We do not credit the respondent's testimony that Bolton asked him for an invoice, or that he ever sent her one. See Tr. 2:44-45, 56-57 (Bolton). She was emphatic, when confronted with the invoice at the hearing, that she had never requested one and he had never sent one, and we credit her testimony. Tr. 2:56-57 (Bolton). We find that the respondent never presented Bolton with an invoice for legal services, a breakdown of the time he spent, or a breakdown of expenses. Tr. 2:43 (Bolton). He never accounted for the thousand dollars she paid or told Bolton what he had done with it, and he has not refunded any of it. Tr. 2:32, 43 (Bolton).

63. We find that the respondent fabricated two invoices for this hearing (Ex. 34 and 35) and not in response to any request from Bolton. We note that in any event the invoices do not identify any expenses.

64. We find that the respondent never told the Lombardis what happened to the $1,000 they paid him. We find that he never gave them an invoice, never gave them a breakdown of the time he spent working on the matter, and never provided them with a breakdown of expenses. Tr. 2:110-111 (Lombardi); Tr. 2:148-149 (Waite).

65. Bolton assumes the respondent still represents her. Tr. 2:64-65 (Bolton). She has not terminated him "[b]ecause he kept on promising he was doing something." Tr. 2:65 (Bolton). This went on for nine years. Id. She does not want to "just cancel him and let him off the hook." Id.

66. Lombardi believes the respondent is still his attorney. Tr. 2:129 (Lombardi). He was in touch with another attorney but the cost to recover was too high. Id.

Conclusions of Law

67. Bar counsel charged that by representing both the Breakers plaintiffs and the Soundings plaintiffs, when the interests of each group were directly adverse to those of the other, without informed consent, the respondent violated Mass. R. Prof. C. 1.7(a)

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c. 93A, the Real Estate Time Share Act and the state Consumer Credit Cost Disclosure Act (M.G.L. c. 140D) all have a four-year statute of limitations. M.G.L. c. 183B, §§ 48, 49; M.G.L. c. 260, § 5A. The Federal Truth in Lending Act cause of action for damages expires one year after the date of occurrence (15 U.S.C. § 1640) or, for rescission, three years after the first of the consummation of the transaction or the sale of the property. 15 U.S.C. § 1635.

for conduct prior to July 1, 2015[7] and Rule 1.7(a)(1) for conduct on and after July 1, 2015.[8] We have detailed above the respondent's failure to get consent for the conflict of interest. Indeed, as explained below, he does not appear even now to understand or admit that there *was* a conflict of interest, so it is goes without saying that there was no meaningful consultation. To sharpen the point: while it may have been permissible at the outset for the respondent to represent both the Soundings and the Breakers plaintiffs, the parties' interests became directly adverse once a condition of the Soundings clients' recovery was the dismissal of the Breakers suit along with the respondent's agreement not to again re-file their suit or represent any of the Breakers clients. We conclude that bar counsel has proved this charge.

68. Bar counsel charged that by representing, without informed consent, both the Breakers plaintiffs and the Soundings plaintiffs when his representation of each group was materially limited by his responsibilities to the other, the respondent violated Mass. R. Prof. C. Rule 1.7(b) for conduct prior to July 1, 2015[9] and Rule 1.7(a)(2) for conduct on and after July 1, 2015.[10] Even if, at the beginning, the interests of the two sets of clients were not directly adverse, once the settlement of the Soundings matter was conditioned on the release of the Breakers claims, the respondent's representation of the Breakers group became materially limited by his responsibilities to the Soundings group. Although bar counsel did not specify in the petition for discipline that the respondent's own personal interests materially limited his responsibilities to his clients, the rule charged includes this category of conflict (see FN 9 and 10), and we find it existed here.[11]

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[7] No representation where directly adverse to another client unless the lawyer reasonably believes the conduct will not adversely affect the relationship with the other client and each client consents after consultation.

[8] No representation where there is a concurrent conflict of interest, which exists if the representation of one client will be directly adverse to another client. Bar counsel has not proved that any conflict of interest occurred after July 1, 2015.

[9] No representation if materially limited by the lawyer's responsibilities to another client, third person or the lawyer's own interests unless lawyer reasonably believes representation will not adversely affect the relationship with the other client and each client consents after consultation.

[10] No representation where there is a concurrent conflict of interest, which exists if there is a significant risk that the representation will be materially limited by the lawyer's responsibilities to another client, a former client or third person or a personal interest of the lawyer. Bar counsel has not proved that any conflict of interest occurred after July 1, 2015.

[11] There is no due process impediment to our relying on a different clause of a properly-charged disciplinary rule. See Matter of Saab, 406 Mass. 315, 324, 6 Mass. Att'y Disc. R. 278, 287 (1989) ("[t]he United States Supreme Court has held . . . that a disciplinary authority may find an attorney's conduct

69. Bar counsel charged that by dismissing the Breakers class action litigation without the authority of his clients and without the consent of the court, the respondent violated Mass. R. Prof. C. 1.2(a) (seek the lawful objectives of client through reasonably available means), 1.4(a) (keep client reasonably informed about status of matter and promptly comply with reasonable requests for information), 1.4(b) (explain matter to the extent reasonably necessary to permit client to make informed decisions), and 3.4(c) (do not knowingly disobey obligation under rules of tribunal).

70. We detailed above the respondent's failure to seek his clients' objectives, failure to keep them apprised so they could make informed decisions, misrepresentations about the status of the lawsuit and intentional violation of the requirement to seek court approval for the dismissal of the Breakers matter. It was particularly disingenuous for him to describe himself, in the Addendum, as the "duly-authorized attorney" of the Breakers plaintiffs, when it appears to us that he did all he could to keep his clients in the dark about his settlement and other activities. We conclude that bar counsel has proved these charges.

71. Bar counsel charged that by dismissing the Breakers class action litigation before a final and enforceable settlement agreement was reached with the developer, and by doing nothing further of substance to protect or advance his clients' rights, the respondent violated Mass. R. Prof. C. 1.1 (provide competent representation), 1.2(a), and 1.3 (act with reasonable diligence and promptness).

72. By agreeing to settle the Soundings case "without incurring any additional financial obligations on the part of [the Breakers]," the respondent effectively bargained away—without even the semblance of authority to do so—the right of his Breakers clients to receive damages. Ex. 11. He allowed the Breakers case to be dismissed, even though he had won it by default and had been invited by the court to move for a default judgment and an assessment of damages. See Ex. 8. Perhaps worst of all, he never told his clients that he had agreed not to represent them going forward, and not to re-file suit on their behalf. This limited his clients' recovery—without their knowledge or consent—

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deficient on an entirely different theory from the one argued by the investigative or prosecuting agency").

and cut off their right to obtain compensation from the defendant. We conclude that bar counsel has proved these charges.

73. Bar counsel charged that by failing to keep his clients reasonably informed about the status of their cases, by intentionally misrepresenting to them the status of their cases, and by failing to turn over Bolton's file as requested in April 2015, the respondent violated Mass. R. Prof. C. 1.4(a) and (b), 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), 1.16(d) (upon termination of representation, surrender papers and property to which client is entitled) and 1.16(e) (promptly make file available within reasonable time of client's request).

74. We agree that the respondent did not timely update Bolton and Lombardi as to the status of the matter. He did not tell them when he had filed suit, and he did not tell them when he had the matter dismissed. He deliberately misrepresented his own actions, leading them to believe that he was continuing to pursue their claims. The emails summarized above reflect the clients' increasing frustration at being lied to, kept in the dark, and forced consistently to chase him to get any information. We conclude that bar counsel had proved violations of rules 1.4(a) and (b), and 8.4(c).

75. We find that the respondent's failure to turn over Bolton's file did not violate rule 1.16(d) because that rule addresses duties upon termination. Bolton has not terminated him and believes he still represents her. We do find that bar counsel has proved a violation of rule 1.16(e).

76. Bar counsel charged that by failing to return to his clients their $1,000 expense advances following dismissal of the action, when the respondent had not incurred expenses in that amount, and by intentionally misusing such funds, the respondent violated Mass. R. Prof. C. 1.16(d), 8.4(c), and 8.4(h) (conduct that adversely reflects on fitness to practice).[12]

77. The fee agreements the clients signed clearly provided that the $1,000 payment was for expenses, and that any expense balance would apply to the firm's fees.

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[12] Bar counsel appears to have withdrawn the Rule 1.5(a) charge (do not enter agreement for, charge, or collect an illegal or clearly excessive fee or collect an unreasonable amount for expenses) set out in the petition for discipline, at ¶39. We treat this as a motion under BBO Rules, § 16(2) to amend the petition by deleting a charge, and we allow the motion.

The respondent spent less than $1,000 in total expenses for all Breakers clients combined, and earned no fees.

78. We do not agree with the respondent's suggestion that his fee agreement is a contingency agreement along with an hourly fee provision. See Tr. 2:149-150 (Respondent). The agreement clearly provides that the $1,000 was for *expenses*, and it proceeds to enumerate these. Exs. 1, 2. By contrast, it makes no reference to a flat fee, retainer, or hourly rate. Nothing in the agreement authorized the respondent to treat the $1,000 as a flat fee or to apply it against any hourly fees.

79. While the respondent could conceivably have drafted a fee agreement that provided for a flat fee, he did not do so. Nor did he base his recovery on the amount of debt forgiven or avoided. Had he defined the basis of his recovery that way, he might have had a claim to a contingent fee. But the agreement he drafted, and which he and his clients signed, provided only for payment to him from his clients' "recovery in money or property." Exs. 1 (001), 2 (003). By his own admission, there was no such recovery.

80. "As a general proposition, the meaning of a written document, if placed in doubt, is construed against the party that wrote it . . . and the principle surely counts double when the drafter is a lawyer writing on his or her own account to a client." Beatty v. NP Corp., 31 Mass. App. Ct. 606, 612 (1991). This is because "[i] n setting fees, lawyers 'are fiduciaries who owe their clients greater duties than are owed under the general law of contracts.'" Id., citing Restatement (Third) of the Law Governing Lawyers § 46, comment b (Tent. Draft No. 4, 1991). See Matter of Kerlinsky, 406 Mass. 67, 72, 6 Mass. Att'y Disc. R. 172, 178 (1989) (fee agreement construed against drafter, who "had the obligation of seeing that all its parts were completed with clarity"); Benalcazar v. Goldsmith, 400 Mass. 111, 114 (1987) (principle that ambiguous document is to be construed against drafter "is particularly applicable where an attorney drafts a contingent fee contract which he knows will be signed by a person without legal training"); Garnick & Scudder, P.C. v. Dolinsky, 45 Mass. App. Ct. 925, 926 (1998) ("the burden of spelling out the fee agreement lies upon [the attorney]"). Cf. Zuckernik v. Jordan Marsh Co., 290 Mass. 151, 156 (1935) (judge correctly denied lawyer travelling and registry expenses where compensation agreement entitled him "to no compensation for expenses except 'court costs actually paid by him'").

81. We find that the respondent intentionally misused all the expense money except for the small amount he spent. His admitted failure to keep contemporaneous time records and to invoice his clients (Tr. 2:185 (Respondent), Tr. 1:122 (Respondent)) undermines his claim that he believed he had earned this money as a fee or otherwise and underscores our conclusion that his misuse was intentional.

82. We conclude that bar counsel has proved violations of rules 1.16(d), 8.4(c) and 8.4(h).

Matters in Mitigation and Aggravation

Mitigation

83. The respondent has offered nothing in mitigation, and we find no mitigating factors.

Aggravation

84. We find many aggravating factors. The respondent testified evasively and demonstrated a lack of candor. We found much of his testimony intentionally false, and the explanations he gave for many of his actions were breathtakingly disingenuous. We were troubled by the ease with which he lied, and his audacity in proffering the fabricated and obviously after-the-fact Bolton invoices. Cf. Matter of Cammarano, 29 Mass. Att'y Disc. R. 82, 98 (2013) (indefinite suspension for varied misconduct; single justice quotes hearing officer's statement that he found the lawyer's testimony "as to 'almost every contested matter not believable'"). Lack of candor is an aggravating circumstance. Matter of Strauss, 479 Mass. 294, 302, 34 Mass. Att'y Disc. R. __ (2018) (false testimony and fabricated documents); Matter of Hoicka, 442 Mass. 1004, 1006, 20 Mass. Att'y Disc. R. 239, 243 (2004); Matter of Friedman, 7 Mass. Att'y Disc. R. 100, 103 (1991); ABA Standards for Imposing Lawyer Sanctions § 9.22(e) and (f).

85. Closely related to the respondent's lack of candor was his profound inability to comprehend his professional obligations to his clients, or to appreciate and acknowledge the wrongfulness of his conduct and its effects. He refused to recognize the principles of conflict of interest, insisting that there can be no conflict of interest if all of the clients are pursuing the same party since "it's a common defendant, so we're all in the same position." Tr. 2:193-194 (Respondent). At other times he argued, inconsistently, that "[e]ach client had different objectives." Ans. ¶ 11. Having been shown that he

settled one group of clients' claims at the expense of another set of clients' claims, he insisted that "I didn't think there was a conflict of interest. I still don't." Tr. 2:158 (Respondent). He showed no contrition about the lies and dissembling he routinely engaged in for many years and exhibited no shame at the bait and switch game he played with his fee agreement (i.e., requesting money for expenses, then claiming entitlement to it as fees).

86. Failure to appreciate the wrongfulness of one's misconduct is a factor in aggravation. See Matter of Moran, 479 Mass. 1016, 1023, 34 Mass. Att'y Disc. R. __ (2018) (collecting cases); Matter of Cobb, 445 Mass. 452, 480, 21 Mass. Att'y Disc. R. 93, 125-126 (2005); Matter of Clooney, 403 Mass. 654, 657, 5 Mass. Att'y Disc. R. 59, 67-68 (1988); ABA Standards for Imposing Lawyer Sanctions, § 9.22(g).

87. The respondent was motivated by greed and self-interest. As detailed above, he sacrificed his clients in the Breakers matter in order to recover fees in the Soundings matter. He requested money from all of his clients for what he described as expenses, then converted it and claimed a right to it as fees, which he otherwise had not earned since he produced no recovery in money or property. Seeking pecuniary gain in the course of a rule violation has been found to be aggravating. Matter of Lupo, 447 Mass. 345, 354, 22 Mass. Att'y Disc. R. 517, 532-533 (2006); Matter of Pike, 408 Mass. 740, 745, 6 Mass. Att'y Disc. R. 256, 261 (1990); ABA Standards for Imposing Lawyer Sanctions, § 9.22(b).

88. The respondent violated numerous rules of professional conduct, and his misconduct impacted many clients. This is an aggravating factor. Matter of Saab, supra, 406 Mass. at 326-327, 6 Mass. Att'y Disc. R. at 289-290 (unethical conduct "longstanding and continuous"); ABA Standards for Imposing Lawyer Sanctions, § 9.22(d).

89. The respondent's conduct caused harm. He failed to return to his clients the money to which he was not entitled. See Moran, supra, 479 Mass. at 1023, 34 Mass. Att'y Disc. R. at ___. Because of his self-interested actions, his clients were deprived of the right to maintain a lawsuit against the Breakers defendants and perhaps recover, as they had hoped, damages for their injuries. Assuming for purposes of argument that his clients had little chance of prevailing, the Court has rejected the argument that there is no

harm in the loss of even a meritless claim. See Matter of Shaughnessy, 19 Mass. Att'y Disc. R. 410 (2003), modified, 442 Mass. 1012, 1013, 20 Mass. Att'y Disc. R. 482, 483-484 (2004); Matter of Long, 24 Mass. Att'y Disc. R. 435, 444-445 (2008).

90. Although not charged, the version of Mass. R. Prof. C. 5.6(b) in effect in 2012 and 2013, when the respondent settled the Soundings and Breakers matters, prohibited a lawyer from making "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy." We find that the respondent's agreement in Ex. 11 not to "re-file said action and not to thereafter represent any clients (present or future) with respect to either the Soundings resort or the Breakers resort" constitutes a violation of this rule. Although it would be inappropriate for us to conclude that the respondent violated a disciplinary rule that was not charged, Matter of Orfanello, 411 Mass. 551, 556, 7 Mass. Att'y Disc. R. 220, 226 (1992), uncharged misconduct may be considered in aggravation. Matter of the Discipline of an Attorney, 448 Mass. 819, 825, n.6 (2007).

Recommended Disposition

Bar counsel recommends a three-year suspension. The respondent makes no recommendation. We recommend a two-year suspension.

Our case law reflects that egregious conflicts of interest are sanctioned by significant suspensions. We agree with bar counsel that this case is analogous to Matter of Traficonte, 22 Mass. Att'y Disc. R. 747 (2006). There, as here, the lawyer settled a proposed class action, and accepted a substantial fee payment from the putative defendant, without his clients' knowledge or consent. He did not disclose to his clients that he would be receiving fees, and he did not disclose to one client, with whom he corresponded, that he had agreed not to serve as counsel for anyone who wanted to proceed with a lawsuit. He made deceptive statements to his clients, and he caused them harm. He was suspended for one year, with a recommendation that as a condition for reinstatement, he prove that he had contributed his net fee to charity.

We also find similarities between the respondent's conduct and the conduct described in Matter of Pike, supra (six-month suspension plus MPRE). There, as here, the lawyer engaged in a flagrant conflict of interest, "conduct [which] cuts at the heart of the attorney-client relationship." Pike, like the respondent, had a direct financial interest in a

transaction "and acted deliberately for his own benefit and in disregard of his client's interest," causing prejudice. Pike, 408 Mass. at 745, 6 Mass. Att'y Disc. R. at 261-262. Cf. Matter of Muse, 12 Mass. Att'y Disc. R. 335, 343-344 (1996) (three-year suspension for long-term "outrageous conflict of interest, driven by personal and financial interests"; attorney represented both conservator and her incapacitated, wealthy client, drafted will in favor of conservator and a friend, and received money from estate as well as probate legal fees and real estate broker fees for sale of client's property).

A term suspension is also appropriate for the respondent's intentional misuse of his clients' expense advances. These were client funds. Matter of Pudlo, 460 Mass. 400, 404, 27 Mass. Att'y Disc. R. 736, 746 (2011) ("[m]onies advanced for expenses and costs have also been considered client funds . . . ."). Although the intentional misuse, with deprivation, of money advanced for expenses has not been subject to the presumptive sanctions for misuse of client funds laid out in Matter of Schoepfer, 426 Mass. 183, 187, 13 Mass. Att'y Disc. R. 679, 685 (1997), we see no reason not to follow the Court's directive as to retainer funds generally, namely, that "the appropriate sanction is disbarment, indefinite suspension, or a term suspension, depending on the facts of the case." Matter of Sharif, 459 Mass. 558, 566, 27 Mass. Att'y Disc. R. 809, 819 (2011) (three-year suspension, with third year stayed, for violations including intentional misuse of client funds, with untimely restitution and mitigated by depression). "That the funds misused here were advanced for legal fees and expenses, rather than being held by the attorney for other purposes, militates toward a more textured comparison of the facts and circumstances of the case to other similar matters in which disciplinary sanctions have been imposed, rather than leaping right to a presumptive set of sanctions." Matter of Pudlo, supra, 460 Mass. at 406, 27 Mass. Att'y Disc. R. at 747-748 (one-year suspension, six months stayed, for misconduct including negligent misuse of client funds and expense money).

Intentional misuse analogous to the respondent's has resulted in a term suspension of at least a year. E.g., Matter of Romeo, 32 Mass. Att'y Disc. R. __, S.J.C. No. BD-2016-109 (October 31, 2016) (two-year suspension, by stipulation, for misconduct including intentional misuse of $2,500 of expense funds, with temporary deprivation resulting, clearly excessive fee and intentional misrepresentations to bar counsel); Matter

of Weisman, 30 Mass. Att'y Disc. R. 440 (2014) (one-year suspension for intentional misuse of retainer causing deprivation and other rule violations, with repayment and aggravating factors); Matter of Hopwood, 24 Mass. Att'y Disc. R. 354 (2008) (one-year suspension, plus restitution, for misconduct including intentional misuse of retainer funds and failure to cooperate with bar counsel).

In recommending a sanction, we are entitled if not obligated to aggregate the misconduct and add in time for the aggravating factors we have found. See Matter of Zak, 476 Mass. 1034, 1039, 33 Mass. Att'y Disc. R. __, __ (2017) (disbarment for varied misconduct plus substantial aggravating factors). We have found no precise precedent for the respondent's serious and widespread misconduct, and extensive aggravating conduct. However, we "need not endeavor to find perfectly analogous cases, nor . . . concern ourselves with anything less than marked disparity in the sanctions imposed." Matter of Hurley, 418 Mass. 649, 655 (1994), cert. denied, 514 U.S. 1036 (1995).

We think a two-year suspension from practice is appropriate in light of the gravity of the respondent's behavior and the need to protect the public. We are mindful that a suspension of this length carries with it the need for a reinstatement hearing, where the respondent will have to prove that he has gained insight into his misconduct, and that he has reformed. We have already observed that we were unfavorably impressed by the respondent's steadfast refusal to recognize the nature and pervasiveness of his misconduct. We think a hearing where he will have to prove moral rectitude is critically important here. We are aware that the respondent will likely need to make restitution to the many Breakers clients he has injured, and we strongly support that requirement.

Respectfully submitted,
By the Hearing Committee,

Adam Bond /mrh
Adam Bond, Esq., Chair

Livia Davis /mrh
Livia Davis, Member

Michael Franco /mrh
Michael Franco, Esq., Member

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the report of the Hearing Committee of the Board of Bar Overseers, in the matter of Bar Counsel, Petitioner v. Richard J. Reilly, Jr., Respondent, by email, Certified Mail, Return Receipt Requested, and first class mail to the Respondent, and by email and delivery in hand to Bar Counsel, Constance V. Vecchione and Assistant Bar Counsel, Robert Daniszewski.

Dated this July 12, 2018.

BOARD OF BAR OVERSEERS

By June D. Risk
June D. Risk
Legal Administrative Assistant